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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 139

JOSEPH J. REMENYI, PETITIONER

v.

CLARK CLIFFORD, SECRETARY OF DEFENSE, WALTER T. SKALLERUP, JR., DEPUTY ASSISTANT SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–7) is reported at 391 F.2d 128. The findings of fact and conclusions of law of the district court (Pet. App. B1–8) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B10–13) was entered on February 28, 1968. The petition for certiorari was filed on May 28, 1968. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

EXECUTIVE ORDERS AND REGULATIONS INVOLVED

Pertinent portions of Executive Order 10501, November 5, 1953 (18 Fed. Reg. 7049), are set out *infra* at pp. 13–15. Pertinent portions of Executive Order 10865 (25 Fed. Reg. 1583) and Department of Defense Directive 5220.6 entitled "Industrial Personnel Access Authorization Review Regulation" dated July 28, 1960, appear as Appendix "C" to the Petition for Certiorari.

QUESTION PRESENTED

Whether, upon a finding that the denial of access authorization to petitioner was procedurally defective, the district court could properly order that petitioner be granted access to information classified as "secret" by the United States Army, Navy and Air Force.

STATEMENT

1. THE ADMINISTRATIVE PROCEEDINGS

This case arises under the Industrial Personnel Security Program administered by the Department of Defense pursuant to the provisions of Executive Order 10865 (25 Fed. Reg. 1583) and Department of Defense Directive 5220.6 (entitled "Industrial Personnel Access Authorization Review Regulation") dated July 28, 1960.[1] Petitioner (plaintiff) was employed by the Rocketdyne Division of North American Avia-

[1] Directive 5220.6 was superseded on January 7, 1967 by a new directive carrying the same number. The provisions of the earlier regulation were in effect during the periods with which we are here concerned. Moreover, the changes so far as the procedures giving rise to the present case are concerned, are changes of form and terminology rather than of substance. Therefore, unless

tion, Inc. at Canoga Park, California and, in connection with his job, he was required to have clearance for access to information classified as "secret" in accordance with Executive Order 10501, 18 Fed. Reg. 7049.[2] Petitioner applied for a "Secret" clearance on or about February 1959. On November 12, 1963, the Department of Defense notified petitioner and his employer that any authorization petitioner possessed for access to classified information was suspended. The notice stated that the screening Board had concluded that the information available to it did not warrant granting petitioner a "Secret" clearance and, that, pending final disposition of his case, access was not authorized at any level (R. 12–13).[3] As a result of such suspension, petitioner's employer terminated his employment (R. 185–186).

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otherwise noted, reference is to the provisions of the Directive dated July 28, 1960 and set forth in the Petitioner's Appendix.

[2] E.O. 10501, pertinent portions of which are set forth in the Appendix, *infra*, is the basic document exercising the President's authority to protect national defense information against unauthorized disclosure. It provides for three categories of national defense information which are, in descending order, "Top Secret"; "Secret" and "Confidential". "Secret" is defined as: "defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations".

[3] "R." refers to the transcript of record in the court below.

The suspension was directed by the Industrial Personnel Access Authorization Screening Board of the Department of Defense in accordance with the provisions of Directive 5220.6 and, as required by that Directive, the Screening Board issued at the time of the notice a "Statement of Reasons" informing petitioner of the grounds upon which his security clearance would be denied or revoked (R. 14–16; 312–315).[4] Petitioner filed an answer to the Statement of Reasons and, invoking the applicable regulations, he requested a personal appearance hearing before an Industrial Personnel Access Authorization Field Board. The case was referred to the Los Angeles Field Board for a hearing (R. 312).

Pursuant to Section 4 of Executive Order 10865, the Defense Department Directive grants the applicant for access authorization a right of cross-examination under limited and specified circumstances. See Section

[4] The Statement of Reasons included, *inter alia*, that petitioner had had contact, during 1948 and 1949, with the Chief of the Czechoslovakian Intelligence Service in Vienna, Austria; that petitioner, in 1945, forged documents which falsely stated that he had been a political prisoner of the Nazis and used such false documents in an application for Austrian citizenship; and that petitioner, in interviews with the Air Force in 1960, had, under oath, testified falsely concerning these activities. These "Reasons" were found to be true by the Field Examiner, who conducted petitioner's hearing as described above, upon consideration (R. 312–315) and reconsideration (R. 300–301), and by the administrative appellate body within the Department of Defense, the Central Industrial Personnel Access Authorization Board (R. 303–304, 308–309). Both the Field Examiner and the Central Board found petitioner, in view of his character, an individual who would act contrary to the national interest (R. 315, 301, 310).

IV, E, 2(f). In this instance, the Defense Department's chief witness, unidentified in the Record, is a person, now a citizen of the United States, who refused to testify in the presence of the petitioner or under conditions where his true identity would be disclosed to petitioner. The witness based his refusal on the fear that he would otherwise jeopardize the safety of certain close relatives still residing in Czechoslovakia (R. 68–69; 304–305; 292). The witness would agree to testify and submit to cross-examination by petitioner's attorneys so long as his true identity was concealed from petitioner. Petitioner and petitioner's counsel agreed to this procedure.[5] Arrangements were therefore made to take the witnesses' testimony in the presence of the Field Examiner, but, when it became apparent that the elicited testimony would lead to identification of the witness by petitioner, the examination was continued outside the presence of the Examiner. The testimony of the witness was then set forth in summary or conclusory form in a stipulation signed by both counsel for petitioner and counsel for the Department of Defense and the stipulation was entered into evidence

[5] As noted below, petitioner's counsel subsequently claimed (R. 259–264) that this agreement had been coerced by counsel for Department of Defense who informed the petitioner's counsel that if an agreement could not be reached to obtain this testimony, resort could be made to the certification procedures of E.O. 10865 and Directive 5220.6 permitting the Secretary of Defense to certify the statement of a witness whose identity cannot be disclosed for "good and sufficient" cause, thus eliminating any confrontation whatsoever (Section 4 of E.O. 10865, and paragraph IV, E, 2(f) of Directive 5220.6. Petitioner's Appendix C–4, C–5; C–24–C–27) (R. 68–70; 306, 300).

at the hearing (R. 291; 305–306; Stipulation and the letter of petitioner's counsel dated February 6, 1964).[6]

The Field Examiner subsequently issued his report which set forth his findings concerning the information alleged in the statement of reasons and which concluded that "it would not be clearly consistent with the national interest to grant [petitioner] access authorization to classified information at any level" (R. 312–324). Pursuant to the applicable provisions of Directive 5220.6 this Report was forwarded to the Central Industrial Personnel Access Authorization Board for final determination. The Central Board tentatively decided to make the same finding as the Field Examiner and, as required by the Directive, petitioner was offered an opportunity of an appearance before the Board, which was requested and at which petitioner appeared through his counsel. At the outset of the Central Board proceeding, counsel for the Department of Defense and for petitioner advised they had agreed, subject to the Board's approval, to reopen the record to permit further examination of the unidentified witness.[7] The Board's approval was given (R. 304–305).

[6] The Stipulation and letter were part of the record in the district court.

[7] Petitioner claimed, and the district court found, that the Department of Defense counsel contacted the members of the Central Board outside the presence of petitioner's counsel and without counsel's consent (R. 5, 187). The answer of the respondents was that the only such contact occurred when Department Counsel approached the Central Board to advise them of the agreement between counsel concerning reopening the record and that this contact was with the knowledge and consent of the petitioner's counsel (R. 75).

Subsequently, additional evidence, including a fifty page deposition of the unidentified witness' testimony on cross-examination, was submitted to the Field Examiner for consideration and the Field Examiner forwarded a "Supplemental Field Board Report" (R. 290–301) to the Central Board, once again concluding that it was not "clearly consistent with the national interest to grant [petitioner] access authorization to classified information at any level" (R. 299–301). After consideration, including the filing of a brief by petitioner in lieu of an offered opportunity for a further personal appearance before the Board (R. 303, 305–307), the Central Board issued its final determination[8] "that the granting of authorization to [petitioner] for access to any information classified pursuant to Executive Order 10501 is not clearly consistent with the national interest" (R. 310), and this suit followed.

2. PROCEEDINGS IN THE COURTS BELOW

Suit was filed by the petitioner subsequent to a final determination by the Department of Defense that the granting of authorization to petitioner for access to classified information was not clearly consistent with the national interest (R. 68, 4). The complaint attacks this denial of access to classified information on the ground, *inter alia,* that the procedures followed were violative of due process of law, and that the respondents had abused their discretion (R. 5–6).

[8] Directive 5220.6, IV, paragraph I(3), provides that, with specified exceptions not here applicable, the Central Board's determination shall be final.

After a hearing, the district court issued findings of fact and conclusions of law holding that the departmental proceedings were conducted in an arbitrary manner and did not conform to the requirements of due process, and that the determination that access authorization to petitioner for classified information was not in the national interest, was arbitrary and an abuse of discretion. Specifically, the court found that (Pet. App. B–5):

> a. [Petitioner] was not permitted to confront the witness testifying against him nor to know the witness' identity;
>
> b. The transcript of the personal appearance proceedings held February 12, 1964, was destroyed without authority and there no longer is any record of that portion of the proceedings;
>
> c. Counsel representing [respondents] improperly contacted the members of the Central Industrial Personnel Access Authorization Board outside the presence of [petitioner] or [petitioner's] counsel and without consent on the part of [petitioner] or [petitioner's] counsel;
>
> d. Evidence not properly authenticated was admitted into the record of the personal appearance proceeding and considered by the Field Board and the Central Board * * *."[9]

[9] Respondents, of course, relied, in the district court, on the agreement and stipulations entered into by petitioner's counsel concerning the examination of the unidentified witness. As noted above, note 5, *supra*, petitioner and petitioner's counsel contended that their agreement had been coerced. The "destroyed transcript" refers to the notes taken at the beginning of the unidentified witness' examination in the presence of the Field Examiner. As already described, that examination was terminated and the testimony merged into a stipulation. It was the

The district court also made the finding that "the granting of access authorization to petitioner for information classified at the Secret level is clearly consistent with the national interests" (R. 184–189). On the basis of these findings, the district court, on August 15, 1966, issued its judgment which ordered, *inter alia,* that "[petitioner] be granted access authorization to information classified as Secret" and remanded the matter to the proper administrative board of the Department of Defense "for further proceedings in conformity with this judgment" (R. 254–255).

Respondents filed a motion to alter or amend the Judgment and Findings of Fact and Conclusions of Law seeking to strike that part of the court's order which directed that petitioner be granted access to classified information (without disturbing the remand to the administrative board for further proceeding in accordance with the court's findings). This motion was denied (R. 257).[10] Thereupon, respondents appealed from that part of the judgment ordering that Remenyi be granted access to information classified

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position of the appellants that, in the circumstances, such destruction was not improper.

As to the improper contact, see note 7, *supra.* The "evidence not properly authenticated" apparently refers to letters concerning records of the Austrian Federal Police. Respondents' position in the district court was that use of such evidence is permitted by the applicable regulations and that, since, the Examiner stated his decision would not be changed by the exclusion of such evidence (R. 299), their admission would not be reversible error.

[10] The operation of the judgment has been stayed pending final adjudication (R. 279–280).

as secret, challenging the authority and jurisdiction of the district court to enter such an order. The court of appeals remanded the case to the district court with instructions to delete the provision in the judgment requiring that Remenyi be granted access authorization, and to delete findings otherwise critical of the agency's action, other than findings intended to establish that impermissible administrative procedures were followed; and the court affirmed the judgment in all other respects.

ARGUMENT

The court of appeals gave petitioner the only relief to which he was entitled: a remand of his cause for further administrative proceedings under regulations according due process. It correctly reversed that part of the district court's judgment directing that the petitioner be granted access to classified information. That result is in accordance with this Court's disposition in *Greene* v. *McElroy*, 360 U.S. 474. As Mr. Justice Harlan, concurring, there pointed out (*id.* at 510): "certainly there is nothing in the Court's opinion which suggests that petitioner must be given access to classified material".

The access order obviously presents difficult and far-reaching constitutional problems concerning the scope of judicial review in light of the principle of separation of executive and judicial powers. But, at all events, these issues are premature. The district court did not question the authority of the Defense Department, acting pursuant to Presidential directive, to control access to national security secrets.

Nor did it hold the applicable departmental regulations unauthorized or unconstitutional. There is, accordingly, no issue here under *Schneider* v. *Smith*, 390 U.S. 17. The only finding was that petitioner's case had been conducted in an impermissible way—a point no longer in issue. In these circumstances, the Defense Department remains free to redetermine petitioner's eligibility for access to classified information under correct procedures, and, until the outcome of those new administrative proceedings is known, it is plainly inappropriate to direct that petitioner be given secret military information, if, indeed, such an order lies in any case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1968.